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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 625

REALTY ASSOCIATES SECURITIES CORPORATION AND REALTY ASSOCIATES, INC.,

Petitioners,

vs.

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, ET AL., ALMON G. RASQUIN, ELIZA B. CARMAN, ET AL., BONDHOLDERS' COMMITTEE OF WHICH WILLIAM E. KENNEDY, JR., IS CHAIRMAN, MANUFACTURERS TRUST COMPANY AND BONDHOLDERS' COMMITTEE OF WHICH FREDERICK S. ROBINSON IS CHAIRMAN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

Realty Associates Securities Corporation, petitioner, by Alfred T. Davison, attorney and counsel, and Realty Associates, Inc. (a creditor and affiliate of the above named bankrupt), petitioner, by James N. Rosenberg, attorney and counsel, pray and each of them prays that a Writ of

Certiorari issue to review the decree (R., p. 151) of the United States Circuit Court of Appeals for the Second Circuit made in the above entitled matter on December 10, 1934 (Judge A. N. Hand dissenting), which decree modifies that portion of an order (R. pp. 85, 97) of the United States District Court for the Eastern District of New York entered April 6, 1934, confirming a composition in bankruptcy under Section 12 of the Bankruptcy Act, which fixed the compensation to which Eugene F. O'Connor, Jr., as Referee in bankruptcy is entitled, by increasing the compensation of said referee from $24,064.87 as fixed in said order of the District Court entered April 6, 1934, to the sum of $65,040.19, being one half of one percent of the total amount of claims ($13,008,038.30) against the Bankrupt estate.

Opinions Below.

The opinion of the District Court (R., p. 102) is reported in 6 F. Supp. 549.

The prevailing opinion of the Circuit Court of Appeals is not yet reported but is printed in the Record (R., p. 152).

The dissenting opinion of Judge A. N. Hand is not yet reported but is printed in the Record (R., p. 161).

Jurisdiction.

The decision of the Circuit Court of Appeals was rendered December 3, 1934, and the order for the mandate thereon was entered December 10, 1934.*

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by Act of Congress of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

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* The issuance of the mandate of the Circuit Court of Appeals has been stayed by that Court pending the consideration and decision of this petition for Writ of Certiorari.

Question Presented.

Whether, in case of a composition under Section 12 of the Bankruptcy Act, the Bankruptcy Act requires that the compensation of a referee *must* be computed not only upon the amount of cash (in this case 15%) paid to creditors upon the confirmation of such composition, but also upon the face or nominal amount remaining due (85%) upon bonds which the creditors retain, rather than (if such bonds are to be considered at all) upon the proven, actual and real value of such bonds at the time of the confirmation of the composition.

This question and point was raised by petitioners before the Circuit Court of Appeals.

Statement of Facts.

This is a bankruptcy proceeding.

The petition in bankruptcy was filed July 10, 1933 (R., pp. 2, 5).

The bankrupt duly made an offer of composition (R., p. 8) to its creditors pursuant to Section 12 of the Bankruptcy Act, which offer of composition was accepted by a majority in number and amount of creditors (R., p. 88).

The total amount of claims proved against the bankrupt estate was $13,008,038.30 (R., p. 65), all of which claims, with the exception of $208,133.90, were based upon bonds outstanding under three indentures between Realty Associates Securities Corporation and Manufacturers Trust Company, as Trustee, dated, respectively, July 1, 1925, December 1, 1927, and October 1, 1928 (R., pp. 9-10).

The corporation's assets with the exception of $3,331,295.72 in liquid assets—cash and investment securities—consisted of equities in real estate, mortgages and instal-

ment contracts for the sale of real estate (R., pp. 5-7) which, if liquidated in the course of administration in bankruptcy, would net a very small amount of money.

The offer of composition provided (R., pp. 9, 10) that the amount to be paid to creditors should be 15% of the amount of their claims as filed and allowed or scheduled; and that the remaining 85% of the amount on which said 15% is computed should be evidenced by the existing outstanding bonds as reduced and modified, as provided in said offer of composition. No new bonds were executed to evidence the remaining 85%; the composition offer provided that the existing outstanding bonds should be stamped with a notation that they had been reduced by such 15% payment, and that they were modified so as to be in conformity with the offer of composition and a new indenture referred to therein, by which the maturity of two of the three series of bonds was extended, the interest rate was reduced from 6% to 5% payable as earned, and certain modifications in protective covenants were prescribed.

The Referee's report on the composition was made on March 12, 1934 (R., p. 45).

The composition was confirmed by order of the District Court entered April 6, 1934 (R., p. 85).

The Referee claimed before the District Court that he was entitled to $65,040.19 as his compensation under Section 40 of the Bankruptcy Act, the same being one-half of one per cent of $13,008,038.30, the total amount of claims filed and allowed or scheduled, such claim being upon the theory that the creditors were to be paid one hundred cents on the dollar upon the confirmation of the composition.

The bankrupt objected to the inclusion in the sum upon which commissions were to be computed of any portion of

the remaining 85% of the claims (15% being paid in cash) which were evidenced by the existing bonds as reduced and modified, except that if such existing bonds which were retained by the creditors after the composition were to be included at all in the sum upon which the Referee's compensation was computed, such bonds should be included only at their market value at the time of the confirmation.

The District Court found that such market value of said bonds after the payment of said 15% in cash was 22, or the equivalent of $220 for the 85% remaining due upon each $1,000 bond retained by the creditors (R., p. 107).

The District Court held that, although the 85% of the old debt persisted undischarged (R., p. 106) it would be unfair to exclude such 85% entirely from the computation of commissions, and added the market value of the bonds retained by creditors to the amount actually to be paid to creditors upon the confirmation of the composition (R., p. 110).

The court further found that the amount to be paid to creditors upon the confirmation of the composition was $4,812,974.17 (R., p. 97), which amount is made up of the total amount of priority claims, plus the 15% in cash on general claims, plus 22% (the value of the retained bonds) of such general claims.

This decision of the District Court resulted in fixing the Referee's compensation at $24,064.87, which is one-half of one per cent of $4,812,974.17 (R., p. 97).

The Referee and also Mr. Fred L. Gross, one of the Receivers, whose compensation had been fixed by the District Court at $28,877.84 (R., p. 97) appealed to the Circuit Court of Appeals from that portion of the order confirming the composition which fixed their fees (R., pp. 115, 123).

The Circuit Court of Appeals affirmed the decision with reference to Mr. Gross's compensation as Receiver but

modified (Judge A. N. Hand dissenting with opinion) the District Court's decision by holding that the Referee was entitled to compensation at the rate of one-half of one per cent upon the face amount of the bonds retained by the creditors (thus making the one-half of one per cent computed upon $13,008,038.30, the entire amount of the claims) and that the court had no jurisdiction to reduce the Referee's compensation even in cases where it appeared to be excessive or unreasonable.

Specifications of Error to be Urged.

The Circuit Court of Appeals erred:

1. In holding that the face amount remaining due upon the bonds which the creditors retained, rather than (if such bonds are to be considered at all) the value of such bonds (as found by the District Court) at the time of the confirmation of the composition, formed part of "the amount to be paid to creditors upon the confirmation of the composition", upon which the commissions of the Referee were to be computed under Section 40 of the Bankruptcy Act.

2. In holding that the amount remaining due upon the bonds which the creditors retained constituted any part of "the amount to be paid to creditors upon the confirmation of the composition", and in allowing any commissions to the Referee on the amount so remaining due.

3. In allowing commissions to the Referee upon amounts which the creditors did not receive upon the confirmation of the composition, and may never receive.

4. In holding that the effect of the confirmation of the composition was to destroy the obligation upon bonds which the creditors were permitted to retain pursuant to the offer of composition, and to substitute a new obligation.

5. In holding that the court had no discretion in fixing the compensation of a Referee to limit such compensation to a reasonable amount.

Reasons for Granting the Writ.

1. This case involves an important question of Federal law of general interest, which has never been decided by this Court, and which it is in the public interest to have decided by this Court of last resort.

The measure of the Referees' fees is contained in Section 40 (a) of the Bankruptcy Act as follows:

> "Referees shall receive as full compensation for their services * * * one half of one percentum on the amount to be paid to creditors upon the confirmation of a composition."

Under the same Section 40 (a), if there is no composition and the estate is fully administered, the Referee receives one percentum of all "*moneys* disbursed" to creditors.

It is quite obvious that if there had been no composition and this estate had been administered, its assets, consisting so very largely of real estate, real estate mortgages and instalment contracts for the sale of real estate, would have brought very little and the Referee's compensation at one percentum would not have been the amount which the Circuit Court of Appeals has awarded on the basis of one half of one percentum.

The question here involved affects almost all compositions offered under Section 12 of the Bankruptcy Act, especially in these depression times when little or no cash can be raised by bankrupts for compositions.

Not only bankruptcy practitioners and reorganization lawyers, but bankruptcy referees, are vitally interested in the proper decision of the questions involved in the judgment sought to be reviewed. In fact, the Respondent Ref-

cree has stated in the course of this proceeding that the ruling in this case on computation of fees was being watched by bankruptcy referees throughout the United States.

In commenting upon the question here involved and the decision of the District Court in the instant case, the Yale Law Journal for November, 1934 (Vol. XLIV, page 162) states:

> "Unfortunately the measure of that commission" (meaning the commission of the referee) "is ambiguously worded, so that from the very first the courts have been compelled to construe out of whole cloth what is 'the amount to be paid creditors upon the confirmation of a composition'. There was no difficulty in the ordinary situation where creditors were paid all in cash through the medium of the court. Where, however, something other than cash or some substitute for part of the cash was employed, the courts were compelled by their own efforts to seek an equitable balance of compensation. * * * Decisions of this nature checked efforts by creditors to lower referees' fees, but the courts have also been vigilant against efforts of referees to secure more than they deserved."

The decision of the Circuit Court of Appeals is the subject of newspaper articles in almost all the metropolitan dailies.

The possibility that a bankrupt corporation may be required to pay excessive fees to referees and other officials interposes a serious obstacle to compositions under Section 12 of the Bankruptcy Act and may discourage the use of the beneficent provisions of that section.

The fees allowed by the Circuit Court of Appeals are, as stated above, greater than would have been payable on complete liquidation.

2. The Circuit Court of Appeals has attempted a construction of Section 40 (a) of the Bankruptcy Act which re-

quires a payment to the Referee at the rate of over $86,000 per year for nine months of part-time work. Such a grotesque result should not be permitted to stand unless this Court finds that such was the intention of Congress in enacting Section 40 (a).

3. The decision of the Circuit Court of Appeals that the words (italics ours)

> "amount to be paid to creditors *upon* the confirmation of the composition"

meant and included amounts which may possibly be paid to creditors within nine years after the composition, is so contrary to the ordinary use and interpretation of the English language as to require review by this Court before being permitted to be final.

4. It is also important that this Court should pass upon the question whether amounts not paid to creditors *upon* the confirmation of the composition but agreed to be paid (either by bonds previously issued and retained by the creditors or by new bonds) many years after the composition and which may never be paid, should be included in the amounts upon which the compensation of a referee is computed. Especially is this so at times such as these, when reorganizations arising out of capital structures set up prior to the present economic depression are so numerous and frequent.

5. The judgment sought to be reviewed is contrary to the *ratio decidendi* of decisions of other circuit courts of appeal, to wit, that fees of referees and other officials cannot be computed upon sums which are not paid to creditors. The Circuit Court of Appeals has allowed commissions to the Referee upon one hundred cents of every dollar of the

claims filed and allowed or scheduled, although the offer of composition provides that the amount to be paid to all creditors shall be only 15% of the amount of their claims as filed and allowed or scheduled, and although the value (as found by the District Court) of the bonds which the creditors retain as evidence of the remaining 85% of their claims, due in 1943, is only 22 cents on the dollar.

6. Both the prevailing and dissenting opinions of the Circuit Court of Appeals rely upon the same cases and decisions, namely, *In re H. Batterman & Co.*, 231 Fed. 699 (C. C. A. 2); *Kinkead* v. *J. Bacon & Sons*, 230 Fed. 362 (C. C. A. 6); and *In re Mills Tea & Butter Co.*, 235 Fed. 815 (D. Mass.), thus showing that there is confusion and ambiguity in the construction of Section 40(a) of the Bankruptcy Act.

7. The principle and implications to be drawn from General Order XLVIII (4) were disregarded by the Circuit Court of Appeals. Unless this Court had recognized that debts which are merely extended under Section 74 of the Bankruptcy Act constituted no part of the amount to be paid to creditors, General Order XLVIII would have accomplished its purpose by merely stating (as the first part does) that the term "composition" should be deemed to include an extension proposal. This Court, however, recognized that without the express statement changing the ordinary practice of compositions, referees would not be entitled to compute commissions upon the amounts of debts which were merely extended; and, therefore, in order that referees might have compensation at all in cases of extension proposals, this Court went on to provide (in General Order XLVIII) that under Section 74 the amount of debts whose maturity is to be extended should be deemed to be a part of "the amount to be paid to creditors".

8. The holding that the bonds retained by the creditors constitute new obligations, and that the original indebtedness is discharged, is contrary to the decision of this Court in *Zavelo* v. *Reeves*, 227 U. S. 625, 629.

WHEREFORE, your petitioners respectfully request that a writ of certiorari should be granted as prayed.

Dated December 27, 1934.

REALTY ASSOCIATES SECURITIES CORPORATION,
By ALFRED T. DAVISON,
Attorney and Counsel for Petitioner.
REALTY ASSOCIATES, INC.,
By JAMES N. ROSENBERG,
Attorney and Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Reference to the Opinions of the court below, and the grounds of jurisdiction, as well as a statement of the case and specifications of error to be urged, are contained in the petition.

Summary of Argument.

I.

THE BANKRUPTCY ACT DOES NOT CONTEMPLATE THAT THE REFEREE SHALL RECEIVE A PERCENTAGE ON WHAT THE CREDITORS DO NOT RECEIVE.

EVEN IF (CONTRARY TO PETITIONER'S CONTENTIONS) THE BONDS WHICH THE CREDITORS RETAIN MAY BE INCLUDED IN THE BASIS FOR COMPUTING COMMISSIONS, NEVERTHELESS, THE HIGHEST AMOUNT WHICH CAN BE SO INCLUDED IS AN AMOUNT SUFFICIENT TO PLACE THE REFEREE ON A PARITY WITH THE CREDITORS.

WHEN, THEREFORE, THE DISTRICT COURT ALLOWED TO THE REFEREE AN AMOUNT EQUAL TO ONE-HALF OF ONE PERCENT OF THE MARKET VALUE OF THE OUTSTANDING BONDS WHICH THE CREDITORS RETAINED, IT PLACED THE REFEREE IN THE SAME POSITION AS THE CREDITORS TO THE EXTENT OF ONE-HALF OF ONE PERCENT OF THE BONDS SO RETAINED.

The Circuit Court of Appeals has ignored the plain meaning of the words "paid" and "upon" in that part of Section 40(a) which provides that referees' compensation shall be one-half of one percentum "upon the amount to be paid to creditors upon the confirmation of the composition."

II.

THE COURT HAD JURISDICTION TO LIMIT THE REFEREE'S COMPENSATION TO A REASONABLE AMOUNT.

III.

THE "AMOUNT TO BE PAID TO CREDITORS UPON THE CONFIRMATION OF THE COMPOSITION" WAS ONLY 15% OF THE AMOUNT OF THEIR CLAIMS AS PROVED AND ALLOWED OR SCHEDULED.

ARGUMENT.

I.

THE BANKRUPTCY ACT DOES NOT CONTEMPLATE THAT THE REFEREE SHALL RECEIVE A PERCENTAGE ON WHAT THE CREDITORS DO NOT RECEIVE.

EVEN IF (CONTRARY TO PETITIONER'S CONTENTIONS) THE BONDS WHICH THE CREDITORS RETAIN MAY BE INCLUDED IN THE BASIS FOR COMPUTING COMMISSIONS, NEVERTHELESS, THE HIGHEST AMOUNT WHICH CAN BE SO INCLUDED IS AN AMOUNT SUFFICIENT TO PLACE THE REFEREE ON A PARITY WITH THE CREDITORS.

WHEN, THEREFORE, THE DISTRICT COURT ALLOWED TO THE REFEREE AN AMOUNT EQUAL TO ONE-HALF OF ONE PER CENT OF THE MARKET VALUE OF THE OUTSTANDING BONDS WHICH THE CREDITORS RETAINED, IT PLACED THE REFEREE IN THE SAME POSITION AS THE CREDITORS TO THE EXTENT OF ONE-HALF OF ONE PER CENT OF THE BONDS SO RETAINED.

The applicable statute, the interpretation of which is the sole issue, is Section 40(a) of the Bankruptcy Act (11 U. S. C. Sec. 68), which has already been quoted, page 7, *supra*.

The decision of the Circuit Court of Appeals violates the two fundamental provisions of Section 40: (1) that commissions can be calculated only upon amounts to be *paid* to creditors (not upon bonds which they retain after the composition as before); and (2) that commissions are calculated only upon amounts to be paid to creditors upon

the confirmation of the composition (not upon amounts which they may receive ten years after the composition).

The Referee, by the decision of the Circuit Court of Appeals, is treated as if the creditors were receiving one hundred cents on the dollar upon the confirmation of the composition, whereas they are in fact to be paid only fifteen cents on the dollar upon the confirmation of the composition, with the right to retain outstanding bonds worth an additional twenty-two cents on the dollar.

It is fundamental in all the decisions and discussions of Section 40, that commissions cannot be computed upon sums which are not actually disbursed to creditors. This was the principle applied by the Circuit Court of Appeals, Third Circuit, in *American Surety Co.* v. *Freed*, 224 Fed. 333. In that case assets appraised at over $1,000,000 were sold under the direction of the Referee. The property was encumbered by a mortgage for $1,000,000 to secure bonds of like amount, and was brought by a bondholders' committee, subject to such mortgage, for $75,000. Although both the referee and the trustee claimed commissions upon $1,075,000 the court held that the commissions could be computed only upon the amount of cash payable and not upon the entire value of the property.

The decision of the Second Circuit, sought to be reviewed herein, is in conflict with the principle approved by the Third Circuit in the *Freed* case, and with other cases involving claims for commissions.

An attempt to apply a theory of constructive receipt in order to obtain commissions upon funds which did not in fact pass through the estate, was likewise defeated in *In re New York Commercial Co.*, 231 Fed. 445 (C. C. A. 2) where trustees had realized a profit of $50,000 on the sale of rubber contracts representing a total amount of approximately $900,000. The court held that only the $50,000

which actually came into the estate and was disbursed as part of the estate, could be used as a basis for commissions, and not the entire amount represented by the contract.

See also:

In re Elk Valley Coal Mining Co., 213 Fed. 383 (W. D. Ky.);

In re Wallace, 14 F. (2d) 534, 539 (E. D. Okla.);

6 Remington Bankruptcy, § 2742.

The principle that commissions cannot be calculated upon sums which are not actually disbursed finds expression in the cases which hold that referees are not entitled to commissions upon re-claimed property, since property returned to its owners by virtue of reclamation proceedings does not constitute a payment to creditors (see *In re Morris Bros.*, 8 F. (2d) 629—D. Ore.).

The word "upon" in Section 40 is also of great significance.

"Upon" (used in a temporal sense) is defined in the Century Dictionary as synonymous with "thereupon" which is in turn defined as "immediately after that: without delay."

Only by completely disregarding the meaning of this word "upon" could the Circuit Court of Appeals hold that the face amount payable in 1943 upon bonds retained by creditors, constituted part of the amount to be paid to creditors "upon" the confirmation of the composition.

The creditors may, as a result of the composition, still have the hope and promise of such payment in 1943; but the notion that payment *as a result* of a composition constitutes payment *upon the confirmation* of the composition, was rejected in *In re Chimovitz*, 30 F. (2d) 114 (E. D. Mich.), and is contrary to the express language of Section 40.

If the bonds retained by creditors are to be considered in any manner as part of the amount paid to creditors upon the confirmation of the composition, they surely cannot in reason or justice be counted as representing a payment of more than their value at the date of confirmation. No logical basis has been suggested by the majority opinion of the Circuit Court of Appeals, or by the respondent, for regarding the retained bonds as if their face amount were agreed to be paid upon the confirmation of the composition.

Furthermore, the only common sense way of dealing with the question is on the basis of the real and actual value of the bonds.

Notes or stock which are paid to creditors as part of the consideration for a composition have been held, in the only reported decisions on the question, to constitute payment for the purpose of computing commissions only to the extent of the value fixed upon them at the time of confirmation.

Such was the holding of the Second Circuit Court of Appeals itself in *In re Batterman Co.*, 231 Fed. 699, which was correctly interpreted by the District Judge and by Judge Augustus N. Hand. The Bankrupt in that case offered a composition of 65% in cash, which was accepted by a majority in number and amount of its creditors. Thereafter a certain group of creditors holding notes of the bankrupt endorsed by another company, waived the deposit of cash for their claims, and exchanged their notes for 15% in cash and the balance of 85% in notes of a new corporation. The court held that:

> "the 15 per cent cash and the 85 per cent in notes are to be regarded as equivalents of the 65 per cent of the claims in cash which was to be paid under the composition agreement."

and allowed commissions on the basis of 65 per cent payment.

By agreeing to substitute the new notes for a 65% cash payment, the creditors in the *Batterman* case had themselves placed a value upon the notes. In the present case there is no cash offer beyond the 15%, from which to calculate the value of the notes, but that does not remove the necessity of ascertaining their value.

The value of stock accepted by creditors in lieu of cash was adopted as the basis of commissions in *In re Mills Tea & Butter Co.*, 235 Fed. 815 (D. Mass), which is in irreconcilable conflict with the decision sought to be reviewed.

If the creditors in the present proceeding wished to reduce their claims entirely to cash upon the confirmation of the composition, the most that they could get for the bonds which they retained would be the market value, twenty-two cents on the dollar. If the Referee is paid commissions at the rate of one-half of one per cent on such market value, he therefore receives (to the extent of ½%) the same amount in cash which the creditors have at the confirmation of the composition.

Conversely, such payment enables the Referee, if he chooses, to buy on the market bonds equal to one-half of one per cent of the total value of bonds retained by creditors. He is thus put (to the extent of ½%) in exactly the same position as the creditors, who still have their original bonds.

The decision of the Circuit Court of Appeals sought to be reviewed gives the Referee more than he is in justice or reason entitled to. It treats him as though the retained bonds were worth their face amount in cash, although the creditors knew that they depended for ultimate payment on the success of the bankrupt's business over a period of ten years, and were worth only 22 on the market. Certainly it is fair to everyone that such bonds should be valued on the basis of the likelihood of their payment and

that such likelihood should be considered in computing the Referee's commissions. No other interpretation of the statute can be supported.

The public interest in the amount of compensation received by judicial officers requires that this Court grant certiorari in a case where an unjustified interpretation of the statute has resulted in grossly excessive compensation.

II.

The Court Had Discretion to Limit the Referee's Compensation to a Reasonable Amount.

The Referee argued below that good conscience had nothing to do with the matter, and that the Referee must be allowed the maximum compensation provided by the statute, no matter how clearly excessive that might be. The word "shall" in Section 40, however, need not be interpreted as removing all discretion from the court. As a matter of fact, "shall" has frequently been interpreted as permissive rather than mandatory when such interpretation was necessary to the ends of justice.

As early as 1885, Judge Wallace declared:

> "The decisions arising upon statutes in which 'shall' has been construed to mean 'may' and 'may' to mean 'shall' are too numerous and familiar to need citation."
>
> *United States* v. *Boyd*, 24 Fed. 692, reversed on other grounds, 116 U. S. 616.

To the same effect is *Munro* v. *New York*, 223 N. Y. 208, 214.

Although petitioners are confident that the judgment sought to be reviewed was clearly erroneous in fixing the basis of compensation, the question of the Court's power

to exercise its discretion in the fixing of fees of court officials is so important that we feel it should be mentioned to this Court in this brief, and considered when the case comes before the Court for review.

III.

THE "AMOUNT TO BE PAID TO CREDITORS UPON THE CONFIRMATION OF THE COMPOSITION" WAS ONLY 15% OF THE AMOUNT OF THEIR CLAIMS AS PROVED AND ALLOWED OR SCHEDULED.

On an accurate review of the offer of composition, not only was the judgment of the Circuit Court of Appeals erroneous, but even the District Court allowed the Referee far more than he was legally entitled to.

Section 40 provides that a Referee's commissions shall be computed "on the amount to be *paid* to creditors *upon* the confirmation of a composition". The offer of composition provides that "the amount to be paid to all creditors * * * shall be fifteen per cent (15%) of the amount of their claims as filed and allowed" or scheduled (R. p. 9).

There is no provision in the offer for any payment to creditors beyond such 15%. Since it has been held that "the amount offered by the bankrupt and accepted by the creditors is the amount to be paid creditors" (*Kinkead* v. *J. Bacon & Sons*, 230 F. 362, C. C. A. 6), it would seem obvious that commissions can be computed only upon the 15% which the bankrupt agreed to pay upon the confirmation of the composition. Nothing else is paid. The bonds which the creditors retain cannot constitute a payment to them; the creditors had possession of them at all times, even prior to the offer of composition.

The contention made by petitioners in the District Court that the bonds which the creditors retained constituted no part of the amounts paid to creditors upon the confirmation

of the composition, is in line with and consistent with the decision of this Court in *Zavelo* v. *Reeves*, 226 U. S. 625, 629 that

> "The discharge destroys the remedy but not the indebtedness."

The confirmation of the composition herein could not, according to the above quoted decision of this Court, destroy the indebtedness upon the bonds which the creditors held; it could only create a defense which might bar any remedy upon them, and which the bankrupt might waive.

In re Chimovitz, 30 F. (2d) 114, is an example of a case where debts which remained unaffected by a composition were excluded from the basis for computing commissions.

General Order XLVIII (4) shows the error in the decision.

This Court recognized that the mere extension of indebtedness by a composition in bankruptcy did not constitute a payment to creditors upon the confirmation of the composition, when it promulgated General Order XLVIII (4), under Section 74 of the Bankruptcy Act.

That order provides first that:

> "For the purposes of computing the commissions of the referee and of the custodian or receiver the term 'composition' as used in sections 40 and 48 of the Act shall be deemed to include an extension proposal."

If the amount of the debts which were extended could be regarded as being paid to creditors upon the confirmation of a composition, the portion of the order quoted above would, standing alone, have entitled referees and receivers to commissions upon such amounts. Since such was not and is not the law under Sections 12 and 40, however, this Court found it necessary to go further and to add to the provision already quoted the following additional clause:

"and the amount of the debts whose maturity is to be extended thereunder, and of the debts, if any, to be paid in full on the confirmation, shall be deemed to be 'the amount to be paid creditors' within the meaning of said sections."

The Circuit Court of Appeals disregarded the rule which is the implied foundation of General Order XLVIII, namely, that debts which are merely continued in existence after the confirmation of a composition, by a waiver of the defense of discharge, do not constitute payments to creditors upon which officials can claim commissions.

Conclusion.

Fairness and good sense and due regard for proper administration rebel against the construction placed upon Section 40(a) by the Circuit Court of Appeals.

In view of the importance of this case in bankruptcy administration, it is earnestly hoped that the petition be granted.

The petition for a Writ of Certiorari should be granted.

Dated New York, December 27, 1934.

ALFRED T. DAVISON,
Counsel for Petitioner,
Realty Associates Securities Corporation.
JAMES N. ROSENBERG,
Counsel for Petitioner,
Realty Associates, Inc.